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98TH CONGRESS, 1st Session | SENATE | REPORT No. 98-169

PROTECTION OF CHILDREN AGAINST SEXUAL EXPLOITATION ACT OF 1983

JUNE 29 (legislative day, JUNE 27), 1983.—Ordered to be printed

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Mr. THURMOND, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 1469]

The Committee on the Judiciary, to which was referred the bill (S. 1469) having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

I. TEXT OF S. 1469 AS REPORTED

A BILL To amend title 18 of the United States Code relating to the sexual exploitation of children

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Congress hereby finds that—

(1) child pornography has developed into a highly organized, multi-million-dollar industry which operates on a nationwide scale;

(2) thousands of children including large numbers of runaway and homeless youth are exploited in the production and distribution of pornographic materials; and

(3) the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the individual child and to society.

SEC. 2. Chapter 110 of title 18, United States Code, is amended to read as follows:

"CHAPTER 110—SEXUAL EXPLOITATION OF CHILDREN

"Sec. 2251. Definitions for chapter.

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"Sec. 2252. Sexual exploitation of children.
"Sec. 2253. Certain activities relating to material involving the sexual exploitation of minors.
"Sec. 2254. Criminal forfeiture.
"Sec. 2255. Civil forfeiture.
"Sec. 2256. Reporting.

"§ 2251. Definitions for chapter

"For the purposes of this chapter, the term—

"(1) 'minor' means any person under the age of eighteen years;

"(2) 'sexually explicit conduct' means actual or simulated—

"(A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

"(B) bestiality;

"(C) sado-masochistic abuse;

"(D) masturbation; or

"(E) a display of the genitals or pubic area of any person for the purpose of arousing or inciting sexual desire;

"(3) 'simulated' means the explicit depiction of any conduct described in clause (2) of this section which creates the actual appearance of such conduct;

"(4) 'producing' means producing, directing, manufacturing, issuing, publishing, or advertising; and

"(5) 'visual or print medium' means any film, photograph, negative, slide, book, magazine, or other visual or print medium.

"§ 2252. Sexual exploitation of children

"(a) Any person who knowingly employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, any sexually explicit conduct for the purpose of producing any visual or print medium depicting such conduct, shall be punished as provided under subsection (c), if such person knows or has reason to know that such visual or print medium will be transported in interstate or foreign commerce or mailed, or if such visual or print medium has actually been transported in interstate or foreign commerce or mailed.

"(b) Any parent, legal guardian, or person having custody or control of a minor who knowingly permits such minor to engage in, or to assist any other person to engage in, sexually explicit conduct for the purpose of producing any visual or print medium depicting such conduct shall be punished as provided under subsection (c) of this section, if such parent, legal guardian, or person knows or has reason to know that such visual or print medium will be transported in interstate or foreign commerce or mailed or if such visual or print medium has actually been transported in interstate or foreign commerce or mailed.

"(c) Any person who violates this section shall be fined not more than $75,000 or imprisoned not more than ten years, or both, but, if such person has a prior conviction under this section, such person shall be fined not more than $150,000 or imprisoned not less than two years nor more than fifteen years, or both.

"§ 2253. Certain activities relating to material involving the sexual exploitation of minors

"(a) Any person who—

"(1) knowingly transports or ships in interstate or foreign commerce or mails any visual or print medium, if—

"(A) the producing of such visual or print medium involves the use of a minor engaging in sexually explicit conduct; and

"(B) such visual or print medium visually depicts such conduct or such visual or print medium is obscene and depicts such conduct; or

"(2) knowingly receives, sells or distributes any visual or print medium that has been transported or shipped in interstate or foreign commerce or mailed, if—

"(A) the producing of such visual or print medium involves the use of a minor engaging in sexually explicit conduct; and

"(B) such visual or print medium visually depicts such conduct or such visual or print medium is obscene and depicts such conduct;

shall be punished as provided in subsection (b) of this section.

"(b)(1) Any person who violates this section shall be fined not more than $75,000 or imprisoned not more than ten years, or both, but, if such person has a prior conviction under this section, such person shall be fined not more than $150,000 or imprisoned not less than two years nor more than fifteen years, or both. Any organization which violates this section shall be fined not more than $250,000.

"(2) For purposes of this section, the term 'organization' means a person other than an individual.

"§ 2254. Criminal forfeiture

"(a) Whoever violates any provision of section 2252 shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 2252, and (2) any interest in, security of, claim against, or property or contractural right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 2252.

"(b) In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders of prohibitions, or to take such other action, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper.

"(c)(1) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable for value by the United States, it shall expire, and shall not revert to the convicted person.

"(2) All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions thereof. Such duties as are imposed upon the collector of customs or any other person with respect to the disposition of property under the customs laws shall be performed under this chapter by the Attorney General.

"(3) The United States shall dispose of all such property as soon as commercially reasonable, making due provision for the rights of innocent persons.

"§2255. Civil forfeiture

"(a) The following property shall be subject to forfeiture by the United States:

"(1) any visual or print medium produced, transported, shipped, or received in violation of this chapter; and

"(2) any property constituting, or derived from, any proceeds obtained, directly or indirectly, from a violation of this chapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

"(b) All provisions of the customs law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws, the disposition of such property or the proceeds from the sale thereof, the remission or mitigation of such forfeitures, and the compromise of claims, shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions of this section, except that such duties as are imposed upon the customs officer or any other person with respect to the seizure and forfeiture of property under the customs laws shall be performed with respect to seizures and forfeitures of property under this section by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General, except to the extent that such duties arise from seizures and forfeitures effected by any customs officer.

"§2256. Reporting

"Beginning one hundred and twenty days after the date of enactment of this Act, and every year thereafter, the Attorney General shall report to Congress the number of cases and convictions brought under section 2252 of title 18, United States Code, and the dollar amount of any forfeiture of assets under section 2254 of such title.".

II. Purpose

The Protection of Children Against Sexual Exploitation Act of 1977 (Public Law 95–225) prohibits (1) the use of children under age 16 in the commercial production of pornography and (2) the commercial distribution of obscene child pornography.

The bill, S. 1469, proposes amendments to the 1977 law which would:

(1) Remove the requirement that the production or distribution of child pornography be for a commercial purpose;

(2) Delete the obscenity requirement from the distribution offense;

(3) Protect children under age 18;

(4) Increase the penalties for violations;

(5) Authorize the imposition of a penalty upon organizations that violate the act; and

(6) Provide for civil and criminal forfeiture.

III. History of Legislation

Senate efforts to amend the Protection of Children Against Sexual Exploitation Act (Public Law 95–225) began in the 97th Congress.

On November 5, 1981, the Subcommittee on Juvenile Justice of the Senate Committee on the Judiciary began hearings on the problem of the sexual exploitation of children. This first hearing explored the nature and scope of the problem. A second hearing on April 1, 1982, examined Federal law enforcement efforts.

On August 19, 1982, Senator Arlen Specter introduced S. 2856 in response to these hearings. A subsequent Subcommittee hearing, held December 10, 1982, in the wake of the Supreme Court's decision in *New York* v. *Ferber,* 102 S. Ct. 3348 (1982), examined the necessity for an obscenity requirement for child pornography.

On July 29, 1982, Senator Charles Grassley introduced S. 2788 which would have amended the law by deleting the obscenity requirement for the distribution of child pornography and on September 30, 1982, Senator Grassley offered an amendment to the Violent Crime and Drug Enforcement Improvements Act of 1982, S. 2572, to accomplish this purpose. It was accepted without objection to the bill, which passed the Senate by a vote of 95–1 but failed to gain consideration in the House.

On January 26, 1983, the first legislative day of the 98th Congress, Senator Specter and Senator Grassley introduced separate bills, S. 57 and S. 29, respectively, on the sexual exploitation of children. On May 9, 1983, Senator Grassley introduced S. 1240, a more comprehensive version of his prior bill. Finally, on June 14, 1983, Senator Specter, with Senator Grassley as the principal cosponsor, combined aspects of their separate bills into S. 1469, and introduced it along with 17 other cosponsors including Judiciary Chairman, Senator Strom Thurmond.

The Judiciary Committee considered S. 1469 on June 16, 1983, and ordered it be reported favorably and without objection.

IV. STATEMENT

A. ELIMINATION OF COMMERCIAL PURPOSE

The clandestine nature of the child pornography industry precludes the availability of actual statistics on the number of children who are used in its production. Experts, however, estimate that the numbers range from the thousands to the hundreds of thousands. The 1977 Act (codified at 18 U.S.C. 2251 et seq.), with its requirement that material be produced for commercial purposes, served to deter large commercial producers. As a result, most of the initial production today consists of videotapes and still photographs, produced by individuals for their own use. The material thus produced is then shared and traded by the producer with other pedophiles.

Frequently, this material produced for private use is pirated by commercial distributers. Consequently, the Federal agencies involved in enforcement of the Act, the Justice Department, the Federal Bureau of Investigation, the Postal Service and the United States Customs Service, agreed that the requirement that material be produced or distributed for a commercial purpose greatly hinders prosecutions. Their enforcement statistics bear this out.

At the April 1, 1982, hearings, the Department of Justice testified that since 1977, under all available obscenity statutes, 47 people had been indicted for distribution of material depicting minors. Forty-three of these people had been convicted, none were acquitted, and charges against three were pending because they were foreign nationals in countries with no extradition treaties. However, because a commercial purpose must be shown for prosecution under the Federal child pornography laws but not under other Federal obscenity statutes (18 U.S.C. 1461, 1462), only 17 of these defendants were indicted under the tougher child pornography laws.

At the same hearing, the FBI testified that at the request of both private citizens and other law enforcement agencies, the Bureau initiated 482 investigations under 18 U.S.C. 2251–2253 and 2423 (transporting minors for purposes of prostitution). These investigations resulted in eight complaints and four informations being filed and 33 indictments being returned. The FBI also confirmed that although most child pornography was produced for private use, it was frequently pirated for reproduction and distribution by commercial operators. See Testimony before the Senate Subcommittee on Juvenile Justice, April 1, 1982.

This bill would address this problem by deleting the requirement that production and distribution be done for a commercial purpose.

B. ELIMINATION OF OBSCENITY REQUIREMENT

On July 2, 1982, the Supreme Court upheld a New York Statute that prohibited the distribution of non-obscene works which depicted minors engaged in sexually explicit conduct. *New York* v. *Ferber,* 102 S. Ct. 3348 (1982). In rejecting the claim that the statute infringed on the First Amendment, the Court found that when children are involved, States can restrict even non-obscene materials because the State's interest in protecting the physiological, emo-

tional, and mental health of children supersedes First Amendment considerations.

When the Protection of Children Against Sexual Exploitation Act was considered by the Senate in 1977, it was unclear whether proof of obscenity would be constitutionally required before an individual could be prosecuted for the distribution of child pornography. In order to avoid a potential invalidation of the law on First Amendment grounds, the Act, as it emerged from the House-Senate Conference, outlawed only the distribution of obscene materials depicting children in sexually explicit conduct.

It is impossible to quantify the effect of this obscenity requirement on Federal prosecutions. It is clear, however, that an obscenity requirement can serve as an impediment to conviction, even where the material at issue contains graphic depictions of sexual conduct by children. Robert Pitler's testimony before the Subcommittee on Juvenile Justice on December 10, 1982, is illustrative of this. Mr. Pitler, who is Chief of the Appeals Bureau for the District Attorney's Office of Manhattan, and is the attorney who argued the *Ferber* case for the State of New York testified that:

> . . . The deterrent value of a statutory ban on obscenity is effectively undercut by the difficulties in prosecuting obscenity cases successfully. The same difficulties in the prosecution of obscenity are present in a prosecution for disseminating materials depicting sexual conduct of children when a successful prosecution turns on proof of the obscenity of those materials.
>
> To begin with, the deterrent effect of obscenity laws is diminished because the concept of obscenity is complex, and its application to particular cases is a matter of considerable delicacy, resting often on highly elusive criteria . . .
>
> Indeed, in the *Ferber* case itself, defendant was charged with two crimes, one of which required proof that the films sold were obscene. The other crime did not require proof of obscenity. Defense counsel agreed that these films were disgusting and offensive and told the jurors that they would well find the films repulsive, but still he called for an acquittal of the obscenity charge because the prosecution failed to prove the films appealed to the prurient interest of the particular group identified by the prosecutor. And the jury then acquitted Ferber on the obscenity charge.

Testimony before the Senate Subcommittee on Juvenile Justice, December 10, 1982, pp. 106–107.

The testimony before the Subcommittee unequivocally supports the conclusion that the children who become involved with child pornography suffer harm. (See, e.g., Testimony of Dr. John Dillingham before the Senate Subcommittee on Juvenile Justice, December 10, 1982, pp. 120–138.) Because the Supreme Court has now settled the obscenity question, S. 1469 removes the obscenity requirement from the distribution offense to maximize the protection Federal law can offer to the Nation's children.

Removal of the obscenity requirement does not, however, operate as a wholesale bar to every picture of an unclothed child. The Court in the *Ferber* case noted:

> There are, of course, limits on the category of child pornography which, like obscenity, is unprotected by the First Amendment. As with all legislation in this sensitive area, the conduct to be adequately defined by the applicable state law, as written or authoritatively construed . . . The category of "sexual conduct" proscribed must also be suitably limited . . .

New York v. *Ferber,* 102 S.Ct. 3348, 3358 (1982).

The bill complies with this requirement by specifically detailing the prohibited conduct as actual or simulated:

(1) Sexual intercourse;
(2) Bestiality;
(3) Sado-masochistic abuse;
(4) Masturbation; or
(5) Display of the genitals or pubic area for the purpose of arousing or inciting sexual desire.

Thus, for example, the parent who takes a picture of a child in the bath, the National Geographic photographer filming a primitive tribe, or the publication of a medical text which includes pictures of nude children would not fall within the prohibition of S. 1469. Conversely, S. 1469 would apply when the prosecution could prove that a defendant photographed nude children for the purpose of distributing those photographs to pedophiles who would be sexually aroused by the material.

C. OTHER REFORMS

1. Age

Current Federal law protects children under age 16. This bill would amend the law to protect all children under age 18. The rationale for this change will succinctly be summarized in a January 10, 1982 letter from Gregory A. Loken, executive director, Institute for Youth Advocacy at Covenant House (Covenant House, which provides services to runaways and other troubled youth, has long been involved in fighting the sexual exploitation of children, and filed an amicus brief urging the Supreme Court to uphold the New York law) to Senator Specter:

> On grounds of policy and logic, it seems to us incredible that a 17-year old adolescent is prohibited from drinking, voting or signing a valid contract, yet is permitted to star in a pornographic movie.

The sponsors of S. 1469 concur with Mr. Loken and believe that the Federal law should be extended to protect children aged 16 and 17.

2. Penalties and Forfeiture

It appears that traditional organized crime elements are rarely involved in trafficking child pornography. However, child pornography can be a very lucrative enterprise.

Current law provides for a $10,000 maximum fine for a first offense and a $15,000 maximum fine for a second offense. This bill would raise these fines to $75,000 and $150,000. In addition S. 1469 would impose a $250,000 fine on organizations which violate the Act. The bill also attempts to remove the monetary incentive to engage in child pornography by providing for both civil and criminal forfeiture.

V. Section-by-Section Analysis

Section 1 sets out congressional findings that child pornography is a national industry, that thousands of youth are exploited by the production and distribution of child pornography and that the use of children as subjects of pornography is harmful to the children and to society.

Section 2 rearranges and amends the provisions of the United States Code (18 U.S.C. 2251–2253) which prohibit the use of children in pornography and adds three new sections to chapter 110.

Section 2251 defines terms used in the chapter, and makes the following alterations from those definitions set forth in the section currently designated as 18 U.S.C. 2253:

(1) "Minor" is defined as any person under age eighteen (current law is sixteen—18 U.S.C. 2253(1));

(2) "(For the purpose of sexual stimulation)" is stricken from the current description of sado-masochistic abuse at 18 U.S.C. 2253(D);

(3) The phrase "Lewd exhibition of the genitals or pubic area of any person" in 18 U.S.C. 2253(E) replaced with "a display of the genitals or pubic area of any person for the purpose of arousing or inciting sexual desire."

(4) "Simulated" is defined for the first time to clarify that only that simulated conduct which creates an explicit appearance of prohibited sexual conduct is encompassed by the Act.

(5) "Producing" is redefined to eliminate the qualification that the product be for pecuniary profit.

Section 2252 amends the provisions currently codified at 18 U.S.C. 2251 by amending subsection (e) to increase the fine for a first violation from $10,000 to $75,000 and from $20,000 to $150,000 for a second violation.

Section 2253 amends the provisions currently codified at 18 U.S.C. 2252 by—

(1) Eliminating the commercial purpose requirement from the distribution and receipt offenses. Instead, S. 1469 makes illegal any interstate transportation, mailing, shipment, receipt, sale or distribution of material which visually depicts minors in sexually explicit conduct;

(2) Eliminating from the distribution and receipt offenses the requirement that material which visually depicts minors in sexually explicit conduct be obscene. The obscenity requirement is retained only for materials which do not visually depict sexually explicit conduct;

(3) Raising the fine for a first violation from $10,000 to $75,000; and

(4) Providing for a $250,000 fine for organizations which violate the Act.

Section 2254 adds an entirely new section to chapter 110 that establishes a criminal forfeiture remedy for persons convicted under the chapter. The section provides that any person convicted of violating any provision of section 2252 shall forfeit to the United States any interest acquired or maintained in violation of the section or any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of in violation of section 2252.

Section 2255 adds another new section to chapter 110 to establish a civil forfeiture remedy. This new section provides that any material produced, transported, shipped or received in violation of chapter 110 and any property constituting or derived from any proceeds obtained from a violation of the chapter shall be forfeited.

This bill adds a final new section to chapter 110 to require that the Attorney General report periodically to Congress the number of cases and convictions brought under section 2252 and the dollar amount of any assets forfeited under section 2254.

VI. Agency Views

By letter dated April 15, 1983, from Assistant Attorney General Robert McConnell to Strom Thurmond, Chairman of the Senate Committee on the Judiciary, the Department of Justice recommended enactment of S. 57 subject to incorporation of a number of amendments. This bill, S. 1469, addresses the concerns the Department of Justice expressed concerning S. 57.

U.S. Department of Justice,
Office of Legislative Affairs,
Washington, D.C., April 15, 1983.

Hon. Strom Thurmond,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

Dear Mr. Chairman: This is in response to your request for the veiws of the Department of Justice on S. 57, a bill "[t]o amend title 18 of the United States Code relating to the sexual exploitation of children." We support the concept behind the bill, namely, to broaden the scope of the federal child pornography laws, but recommend against enactment of parts of the bill. In this regard, we prefer the approach taken in section 1502 of the President's Comprehensive Crime Control Act of 1983 introduced in the Senate as S. 829.

S. 57 accomplishes several purposes: (1) it removes the obscenity requirement of the current child pornography law; (2) it eliminates the commercial-purpose limitation of current law; (3) it redefines the term "minor" to mean any person under the age of 18 years, rahter than 16 years; (4) it defines the term "simulated," which is not defined in the current provision; (5) it provides for the assertion of an affirmative defense in prosecutions for the production or distribution of certain types of child pornography; (6) it raises the ap-

plicable fines for violations of the federal child pornography statutes; and (7) it makes violations of the federal child pornography statutes predicate offenses for purposes of 18 U.S.C. Chapter 96, relating to racketeer influenced and corrupt organizations (RICO). Our comments regarding each of these issues addressed by S. 57 are set out separately below.

In addition, section 2 of the bill sets forth Congressional findings that "child pornography has developed into a highly organized, multimillion-dollar industry which operates on a nationwide scale. We question the accuracy of these suggested findings. It has been our understanding that many of the individuals who distribute materials covered by the federal child pornography provisions do so by trade or exchange, without any commerical purpose, and that participants in organized crime generally have shunned any involvement in the production or distribution of child pornography.

It should also be noted that S. 57 does not amend the wiretap law, 18 U.S.C. 2516, to add child pornography offenses to the list of offenses for which a court-ordered interception of a wire or oral communication is authorized. Section 1604 of S. 829 contains such an amendment.

ELIMINATION OF THE OBSCENITY REQUIREMENT

S. 57 would remove the requirement of 18 U.S.C. 2252 that material subject to the statute's proscription be obscene. (Under S. 57 this provision would be renumbered at section 2253. This aspect of the bill is an outgrowth of the Supreme Court's decision in *New York* v. *Ferber,* 102 S. Ct. 3348 (1982), which held that the obscenity standard set forth in *Miller* v. *California*, 413 U.S. 15 (1973), does not apply to photographic or other depictions of children engaging in sexual conduct. The Administration's bill would not eliminate the obscenity standard for all categories of child pornography. Specifically, the Administration's bill would eliminate the obscenity requirement of 18 U.S.C. 2252 only with respect to a visual or print medium which visually depicts a minor engaging in sexually explicit conduct. Where the visual or print medium does not visually depict such conduct, for example in the case of a written description without photographs, the obscenity requirement of current law would be retained.

We interpret *Ferber* as requiring that an amendment of 18 U.S.C. 2252 to remove the obscenity requirement distinguish between visual and non-visual depictions of sexual conduct by minors and apply only to the former. As a practical matter, the distinction between visual and non-visual depictions of minors engaging in sexually explicit conduct is not quantitatively significant with respect to potential violations of 18 U.S.C. 2252. In any case a violation can only exist if "the producing of [the] visual or print medium involves the use of a minor engaging in sexually explicit conduct." Thus, the obscenity standard in the Administration's bill for non-visual depictions of minors engaging in sexually explicit conduct would apply to a very small category of child pornography materials.

ELIMINATION OF THE COMMERCIAL-PURPOSE LIMITATION

S. 57 would eliminate the commercial-purpose limitation of current law. This change is in accord with section 1502 of the Administration's crime bill, S. 829, which also removes the commercial-purpose limitation. Utilization of 18 U.S.C. 2252 has been limited by the fact that the statute covers the distribution of child pornography only for commercial purposes. As stated earlier, many of the individuals who distribute materials covered by 18 U.S.C. 2252 do so by trade or exchange, without any commercial purpose, and thereby avoid violating this provision. Moreover, those who use or entice children to engage in sexually explicit conduct for the purpose of creating a visual or print medium depicting such conduct do not violate 18 U.S.C. 2251 if their conduct is not for pecuniary profit. This result is attributable to the definition of "producing" in section 2253 and the use of that term in section 2251. Nevertheless, the harm to children involved in child pornography schemes exists whether or not those who initiate or carry out these schemes have a profit motive or commercial purpose.

Although we support the concept of eliminating the commercial-purpose limitation of current law, we do not endorse the manner in which this would be accomplished by S. 57. The difficulty with S. 57 is that it deletes more language than is necessary from 18 U.S.C. 2252(a)(2) merely to eliminate the commercial-purpose limitation of that provision. Specifically, the revision of this section, which would be remembered section 2253(a)(2) by S. 57, strikes from current law not only the commercial-purpose limitation applicable to the offenses of knowingly receiving or distributing child pornography materials, but also strikes the underlying offenses of selling or distributing. That is, proposed section 2253(a)(2) reads, "Any person who . . . knowingly receives any visual or print medium . . . shall be punished. . . ." In order not to eliminate the offenses of knowing sale or distribution of the material in question, the provision should be amended to read, "Any person who . . . knowingly receives, sells, or distributes any visual or print medium . . . shall be punished. . . ." Section 1502 of the Administration's bill would amend current law in this manner.

AMENDING THE DEFINITION OF "MINOR"

S. 57 would amend the definition of "minor" for purposes of the federal child pornography statutes by including within this term any person under the age of 18 years, rather than 16 years as under current law. The effect, of course, would be to broaden the reach of the federal child pornography provisions.

In *Ferber* the New York statute scrutinized and upheld by the Court protected children under the age of 16. Similarly, the Administration's crime bill does not amend the definition of "minor" and, thus, retains the 16-year age limit. Although the 16-year age limit was in essence approved in *Ferber*, we do not believe that *Ferber* precluded the possibility of an 18-year age limit for minors protected by a child pornography statute. Moreover, we do not think that the retention of the 16-year age limit in the Administration's bill reflects a conscious rejection of a possible 18-year age limit. The appropriate definition of the term "minor" for purposes of the federal

child pornography provisions appears at this time best left to a determination by Congress.

DEFINING THE TERM "SIMULATED"

S. 57 defines the word "simulated," a term which is used but not defined in the current child pornography provisions. The bill defines this term to mean "the explicit depiction of any ['sexually explicit conduct' as defined] which creates the appearance of such conduct and which exhibits any uncovered portion of the genitals or buttocks." We believe that S. 57 defines the term "simulated" too narrowly and that certain conduct excluded by the definition should be included within the law's proscriptions. For example, the child pornography provisions should protect a child against pornographers who would film him or her totally clothed in a body stocking engaging in simulated sexual intercourse with an adult or another child. The harm to children used by adults in this manner to produce pornography is significant even though the child may be clothed. Moreover, the requirement that the simulated sexual conduct exhibit any uncovered portion of the genitals or buttocks would exclude simulated sexual conduct in which the unclothed portions of the body are simply out of view of the camera. S. 57's definition of "simulated" in our view could prove to be a significant loophole to imaginative pornographers.

In light of these concerns, we believe that the term "simulated" should not be defined or that the definition should not require the exhibiting of any uncovered portion of the genitals or buttocks. The Administration's crime bill does not define the term "simulated" for purposes of the federal child pornography statutes.

AFFIRMATIVE DEFENSE

S. 57 would create a new section, 18 U.S.C. 2254, providing for the assertion of an affirmative defense in prosecutions brought for the production or distribution of child pornography depicting certain categories of sexually explicit conduct. The defense with regard to these categories would be that "the medium, when taken as whole, possesses serious literary, artistic, scientific, social, or educational value." We strongly oppose this aspect of the bill.

Language establishing an affirmative defense has not been included in the Administration's crime bill. The proposal in S. 57 of a new section 2254 essentially retains the obscenity standard for certain categories of child pornography by way of an affirmative defense. Thus, it significantly undercuts the basic philosophy of *Ferber,* which authorized the elimination of the obscenity standard in the context of child pornography for the same categories of sexually explicit conduct to which S. 57 applies this standard.

Even in the absence of the affirmative defense provided in S. 57, a defendant may take the position that the application of the child pornography statute to his case is unconstitutional and falls within the "tiny fraction of the materials within the statute's reach" which the Court recognized should receive constitutional protection. 102 S. Ct. at 3363. The Court approved the New York statute despite the absence of an affirmative defense provision. However, including an affirmative defense provision in the federal child por-

nography statute in our view would produce consequences far beyond protecting this small class of materials. It may provide an appealing loophole for pornographers intent upon thwarting the purpose of the statute by placing otherwise proscribed child pornography materials within a legitimate literary or scientific work. Proving the defense—that the medium, when taken as a whole, possesses serious literary, artistic, scientific, social, or educational value—would not be difficult in such cases. Thwarting the statute in this manner would be less likely if the child pornography statutes are amended without the inclusion of an affirmative defense since the exact boundaries of potentially unconstitutional applications of the New York statute were not defined by the Court; determining these boundaries would be risky for would-be violators. On the other hand, the affirmative defense proposed in S. 57 is practically an invitation to distribute child pornography in a conviction-proof medium.

In addition, the affirmative defense provided by S. 57 would make prosecutions difficult by allowing defendants to cloud the issues. It is likely that an affirmative defense would be raised frivolously in many cases and that complicated proceedings necessitating the use of otherwise unnecessary expert witnesses would result.

Finally, we would note that the primary purpose of the proposed affirmative defense is to address concerns raised by authors and publishers of legitimate sex education books who fear that, without such a defense, their works would be reached by the anti-child pornography law. We do not believe this to be the case in light of the definition of "sexually explicit conduct" set out at 18 U.S.C. 2253, particularly in conjunction with the requirement that the production of the material involve the "use" of a minor engaging in such conduct. Given the concerns expressed by publishers, however, it may be desirable to note in the legislative history of the bill that it is not designed to reach legitimate sex education material. Such an approach would be far preferable to creation of a statutory affirmative defense which would, we believe, substantially undermine the basic thrust of S. 57—to strengthen federal anti-child pornography enforcement efforts.

INCREASING FINES

S. 57 would increase the fines applicable to violations of the federal child pornography statutes from $10,000 to $75,000 for the first offense and from $15,000 to $150,000 for any subsequent offense. While we support increasing fines as a greater deterrent to the commission of crimes involving the sexual exploitation of children, we believe that the fines applicable to many other criminal offeses should also be increased. Current fine levels generally reflect monetary values of prior decades and are too low to be a realistic measure of the gravity of the offense committed. Title II of the Administration's crime bill takes a comprehensive approach to increasing maximum fine levels applicable to criminal offenses and to specifying the criteria to be considered in the imposition of fines. Moreover, the Administration's bill would increase maximum fines to a higher level than would S. 57.

RICO AMENDMENTS

Finally, S. 57 would amend chapter 96 of title 18, United States Code, relating to racketeer influenced and corrupt organizations. Specifically, section 4 of the bill would make a violation of the federal child pornography statutes a predicate offense for purposes of chapter 96 by including them under the definition of "racketeering activity" in 18 U.S.C. 1961(1). S. 57 would also amend 18 U.S.C. 1964(c) relating to civil remedies.

We oppose S. 57's amendment of the RICO statutes. We point out that the Administration's crime bill does not amend RICO in order to make violations of the federal child pornography statutes predicate offenses. The penalties for a violation of the federal child pornography laws are sufficiently severe (10 years for a first offense and 15 years for a second offense, in addition to the increased fines under S. 57) that RICO coverage with its 20-year maximum sentence is not necessary. Moreover, in light of the complications which arise in RICO prosecutions, we believe its coverage should not be expanded except where a clear need exists.

In conclusion, we recommend enactment of S. 57 subject to incorporation of the amendments set out above. The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

ROBERT A. MCCONNELL,
Assistant Attorney General.

VII. COST ESTIMATE

In accordance with paragraph 11(a), Rule XXVI, of the Standing Rules of the Senate, the Committee offers the Report of the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, D.C., June 23, 1983.

Hon. STROM THURMOND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed S. 1469, a bill to amend Title 18 of the United States Code relating to the sexual exploitation of children, as ordered reported by the Senate Committee on the Judiciary, June 16, 1983.

The bill increases penalties for individuals who knowingly employ, use, presuade, induce, or coerce a minor into a sexually explicit act for the purpose of producing pornographic material. Penalties are also prescribed for individuals and organizations participating in the sale, transport, and distribution of child pornography. It is expected that no significant additional cost to the federal government or to state and local govenments would be incurred as a result of enactment of this bill.

Should the Committee so desire, we would be pleased to provide further details on this estimate.

Sincerely,

JAMES BLUM
(For Alice M. Rivlin, Director).

VIII. REGULATORY IMPACT

In accordance with Rule XXVI, paragraph 11(b) of the Standing Rules of the Senate, the following statement of the regulatory impact of S. 1469 is made:

A. Estimated Number of Individuals and Businesses Regulated and Their Groups or Classification.

The bill amends current law to extend existing authority. The amendments would not result in any significant regulatory burden beyond the modifications to reflect the extensions. The Committee has determined that this legislation would not increase the regulatory and paperwork burdens on individuals or businesses.

B. Economic Impact

The Committee believes that enactment of this legislation will not cause any significant economic impact on individuals.

C. Impact on Personal Privacy

The Committee believes that enactment of this legislation will not cause any impact on personal privacy.

D. Additional, Paperwork, Lost Time

The Committee believes that enactment of this legislation will not cause any additional paperwork.

IX. CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

UNITED STATES CODE

TITLE 18—CRIMES AND CRIMINAL PROCEDURE

* * * * * * *

CHAPTER 110—SEXUAL EXPLOITATION OF CHILDREN

[Sec.
[2251. Sexual exploitation of children.
[2252. Certain activities relating to material involving the sexual exploitation of minors.
[2253. Definitions for chapter.]
Sec. 22.51. Definitions for chapter.
Sec. 22.52. Sexual exploitation of children.
Sec. 22.53. Certain activities relating to material involving the sexual exploitation of minors.
Sec. 22.54. Criminal forfeiture.
Sec. 22.55. Civil forfeiture.
Sec. 22.56. Reporting.

[§ 2251. Sexual exploitation of children

[(a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, any sexually explicit conduct for the purpose of producing any visual or print medium depicting such conduct, shall be punished as provided under subsection (c), if such person knows or has reason to know that such visual or print medium will be transported in interstate or foreign commerce or mailed, or if such visual or print medium has actually been transported in interstate or foreign commerce or mailed.

[(b) Any parent, legal guardian, or person having custody or control of a minor who knowingly permits such minor to engage in, or to assist any other person to engage in, sexually explicit conduct for the purpose of producing any visual or print medium depicting such conduct shall be punished as provided under subsection (c) of this section, if such parent, legal guardian, or person knows or has reason to know that such visual or print medium will be transported in interstate or foreign commerce or mailed or if such visual or print medium has actually been transported in interstate of foreign commerce or mailed.

[(c) Any person who violates this section shall be fined not more than $10,000, or imprisoned not more than 10 years, or both, but, if such person has a prior conviction under this section, such person shall be fined not more than $15,000, or imprisoned not less than two years nor more than 15 years, or both.]

§ 2251. Definitions for chapter

For the purposes of this chapter, the term—

(1) "minor" means any person under the age of eighteen years;

(2) "sexually explicit conduct" means actual or simulated—

(A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(B) bestiality;

(C) sado-masochistic abuse;

(D) masturbation; or

(E) a display of the genitals or pubic area of any person for the purpose of arousing or inciting sexual desire;

(3) "simulated" means the explicit depiction of any conduct described in clause (2) of this section which creates the actual appearance of such conduct;

(4) "producing" means producing, directing, manufacturing, issuing, publishing, or advertising; and

(5) "visual of or print medium" means any film, photograph, negative, slide, book, magazine, or other visual or print medium.

[§ 2252. Certain activities relating to material involving the sexual exploitation of minors

[(a) Any person who—

[(1) knowingly transports or ships in interstate or foreign commerce or mails for the purpose of sale or distribution for sale, any obscene visual or print medium, if—

[(A) the producing of such visual or print medium involves the use of a minor engaging in sexually explicit conduct; and

[(B) such visual or print medium depicts such conduct; or

[(2) knowingly receives for the purpose of sale or distribution for sale, or knowingly sells or distributes for sale, any obscene visual or print medium that has been transported or shipped in interstate or foreign commerce or mailed, if—

[(A) the producing of such visual or print medium involves the use of a minor engaging in sexually explicit conduct; and

[(B) such visual or print medium depicts such conduct;

[shall be punished as provided in subsection (b) of this section.

[(b) Any person who violates this section shall be fined not more than $10,000, or imprisoned not more than 10 years, or both, but, if such person has a prior conviction under this section, such person shall be fined not more than $15,000, or imprisoned not less than two years nor more than 15 years, or both.]

§ 2252. Sexual exploitation of children

(a) Any person who knowingly employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, any sexually explicit conduct for the purpose of producing any visual or print medium depicting such conduct, shall be punished as provided under subsection (c), if such person knows or has reason to know that such visual or print medium will be transported in interstate or foreign commerce or mailed, or if such visual or print medium has actually been transported in interstate or foreign commerce or mailed.

(b) Any parent, legal guardian, or person having custody or control of a minor who knowingly permits such minor to engage in, or to assist any other person to engage in, sexually explicit conduct for the purpose of producing any visual or print medium depiciting such conduct shall be punished as provided under subsection (c) of this section, if such parent, legal guardian, or person knows or has reason to know that such visual or print medium will be transported in interstate or foreign commerce or mailed or if such visual or print medium has actually been transported in interstate or foreign commerce or mailed.

(c) Any person who violates this section shall be fined not more than $75,000 or imprisoned not more than ten years, or both, but, if such person has a prior conviction under this section, such person shall be fined not more than $150,000 or imprisoned not less than two years nor more than fifteen years or both.

[§ 2253. Definitions for chapter

[[For the purposes of this chapter, the term—

[(1) "minor" means any person under the age of sixteen years;

[(2) "sexually explicit conduct" means actual or simulated—

[(A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

[(B) bestiality;
[(C) masturbation;
[(D) sado-masochistic abuse (for the purpose of sexual stimulation); or
[(E) lewd exhibition of the genitals or pubic area of any person;
[(3) "producing" means producing, directing, manufacturing, issuing, publishing, or advertising, for pecuniary profit; and
[(4) "visual or print medium" means any film, photograph, negative, slide, book, magazine, or other visual or print medium.]

§ 2253. Certain activities relating to material involving the sexual exploitation of minors

(a) Any person who—
(1) knowingly transports or ships in interstate or foreign commerce or mails any visual or print medium, if—
(A) the producing of such visual or print medium involves the use of a minor engaging in sexually explicit conduct; and
(B) such visual or print medium visually depicts such conduct or such visual or print medium is obscene and depicts such conduct; or
(2) knowingly receives, sells or distributes any visual or print medium that has been transported or shipped in interstate or foreign commerce or mailed, if—
(A) the producing of such visual or print medium involves the use of a minor engaging in sexually explicit conduct; and
(B) such visual or print medium visually depicts such conduct or such visual or print medium is obscene and depicts such conduct;
shall be punished as provided in subsection (b) of this section.
(b)(1) Any person who violates this section shall be fined not more than $75,000 or imprisoned not more than ten years, or both, but, if such person has a prior conviction under this section, such person shall be fined not more than $150,000 or imprisoned not less than two years nor more than fifteen years, or both. Any organization which violates this section shall be fined not more than $250,000.
(2) For purposes of this section, the term "organization" means a person other than an individual.

§ 2254. Criminal forfeiture

(a) Whoever violates any provision of section 2252 shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 2252, and (2) any interest in, security of, claim against, or property or contractural right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 2252.
(b) In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders of prohibitions, or to take such other action, including, but not limited to, the acceptance of satisfactory

performance bonds, in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper.

(c)(1) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable for value by the United States, it shall expire, and shall not revert to the convicted person.

(2) All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions thereof. Such duties as are imposed upon the collector of customs or any other person with respect to the disposition of property under the customs laws shall be performed under this chapter by the Attorney General.

(3) The United States shall dispose of all such property as soon as commercially reasonable, making due provision for the rights of innocent persons.

§ 2255. Civil forfeiture

(a) The following property shall be subject to forfeiture by the United States:

(1) any visual or print medium produced, transported, shipped, or received in violation of this chapter; and

(2) any property constituting, or derived from, any proceeds obtained, directly or indirectly, from a violation of this chapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(b) All provisions of the customs law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws, the disposition of such property or the proceeds from the sale thereof, the remission or mitigation of such forfeitures, and the compromise of claims, shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions of this section, except that such duties as are imposed upon the customs officer or any other person with respect to the seizure and forfeiture of property under the customs laws shall be performed with respect to seizures and forfeitures of property under this section by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General, except to the extent that such duties arise from seizures and forfeitures effected by any customs officer.

§ 2256. Reporting

Beginning one hundred and twenty days after the date of enactment of this Act, and every year thereafter, the Attorney General shall report to Congress the number of cases and convictions

brought under section 2252 of title 18, United States Code, and the dollar amount of any forfeiture of assets under section 2254 of such title.

X. Vote of Committee

On June 16, 1983, S. 1469 was ordered reported by the Committee on the Judiciary without objection.

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